#109

YORK UNIVERSITY

OSGOODE HALL LAW SCHOOL

4700 KEELE STREET, DOWNSVIEW, ONTARIO M3J 2R5

March 6, 1980

The Honourable Robert G. Elgie, M.D.
Minister
Ministry of Labour
400 University Avenue
Toronto, Ontario

Re: The Complaint made by Ms. Phyllis Ingram of Toronto, Ontario, alleging discrimination in employment by Natural Footwear Limited, 1203 Caledonia Road, Toronto, Ontario.

Dear Sir:

I am pleased to submit herewith my report with respect to the above matter.

Yours very truly,

John D. McCamus

JDM:vv

Encl.

cc: Ontario Human Rights Commission ✓
Mr. M. Cohen

THE ONTARIO HUMAN RIGHTS CODE,

R.S.O. 1970, Chapter 318, as amended

IN THE MATTER OF the complaint made by Ms. Phyllis Ingram of Toronto, Ontario, alleging discrimination in employment by Natural Footwear Limited, 1203 Caledonia Road, Toronto, Ontario.

A HEARING BEFORE: Professor John D. McCamus
Appointed a Board of Inquiry into the above matter by the Minister of Labour, The Hon. Robert Elgie, to hear and decide the above-mentioned complaint.

Appearances:

Mr. A.C. Millward Mr. D.A.J. D'Oliveira	Counsel for the Ontario Human Rights Commission and Ms. Phyllis Ingram
Mr. M.M. Cohen Mr. P. BonEnfant	Counsel for Natural Footwear Limited

---

I. Introduction

This Board of Inquiry was established by the Minister of Labour of the Government of Ontario under section 14(a) of the Ontario Human Rights Code, R.S.O. 1970, c. 318, as amended to inquire into a complaint filed with the Ontario Human Rights Commission by Ms. Phyllis Ingram. In her complaint (filed as Exhibit 1) Ms. Ingram alleged the following:

> I am a black Jamaican-Canadian woman, and I believe that I was discriminated against in my employment because of my race and colour, contrary to section 4(1)(b),(g) of the Ontario Human Rights Code ...

Section 4(1)(b),(g) of the Ontario Human Rights Code provides as follows:

> (1) No person shall,
>
> ... (b) dismiss or refuse to employ or to continue to employ any person;
>
> ... (g) discriminate against any employee with regard to any term or condition of employment,
>
> because of race, creed, colour, age, sex, marital status, nationality, ancestry, or place of origin of such person or employee

In her complaint, Ms. Ingram alleges that the respondent, Natural Footwear Limited, discriminated against her by reason of her race or colour, in imposing unfairly burdensome work conditions upon her, in refusing to give her a raise at a time when, she alleges, all other employees in her area were given a raise, and finally, in dismissing her from her job on January 11, 1978. At all material times, the person responsible for making employment decisions with respect to Ms. Ingram at Natural Footwear Limited was her supervisor, Mr. Stanley Kowalewski. It was Mr. Kowalewski who supervised Ms. Ingram's work, who decided to not give her a raise in December of 1977, and who made the decision to dismiss Ms. Ingram on January 11, 1978. The central question before

this Board of Inquiry, then, is whether Mr. Kowalewski, in his dealings with Ms. Ingram, discriminated against her on the basis of her race or colour.

The position taken by the respondent, Natural Footwear Limited, with respect to these allegations, is that they are completely unfounded. Natural Footwear Limited maintains that it has not, since its inception in 1973, discriminated in its hiring or employment practices. Indeed, Mr. Cohen has argued on behalf of Natural Footwear Limited that it is a model employer in this respect and that its work force is a "regular United Nations" consisting of individuals from various ethnic, racial and colour groupings. With particular reference to the allegations of Ms. Ingram, the respondent alleges that Mr. Stanley Kowalewski's decision to terminate her contract of employment with Natural Footwear was motivated solely by a determination that she was failing to discharge her responsibilities as an employee conscientiously and competently. The respondent denies that Ms. Ingram was subjected to discriminatory treatment with respect to the terms and conditions of her employment.

As a preliminary matter, it will be useful to indicate briefly the general nature of the evidence presented to this Board of Inquiry. The evidence led in support of Ms. Ingram's allegations was essentially of two different kinds. First, Ms. Ingram herself testified with respect to the circumstances leading to and culminating in her dismissal. It was her view, as expressed by her in her testimony, that the only possible explanation for these events was that Mr. Stanley Kowalewski was motivated by feelings of racial discrimination. The second type of evidence led in support of Ms. Ingram's allegations had as its object

the demonstration of a theory, advanced by Mr. Millward and Mr. D'Oliveira, that there was a pattern of discriminatory activity at Natural Footwear Limited, of which the firing of Ms. Ingram formed a part. Although, as will be seen, Ms. Ingram would appear to be the only black employee fired by Mr. Stanley Kowalewski, there were other black employees fired by other managers and, it is alleged, these dismissals should also be seen as acts motivated by racial discrimination. A number of black former employees of Natural Footwear Limited appeared before this Board of Inquiry and indicated that they felt their dismissals were unwarranted.

On behalf of Natural Footwear Limited, evidence was led which tended to show that the dismissal of Ms. Ingram and the other dismissed black employees was based on considerations other than those of racial discrimination. Further, a group of employees, some of whom were black, testified to the effect that they did not feel that practices of racial discrimination occurred at Natural Footwear Limited. Simply stated, it was their view that all employees at Natural Footwear Limited were treated equally from this point of view by the various managers and supervisors. More particularly, two black employees testified that they felt Mr. Stanley Kowalewski did not act in a discriminatory fashion in his dealings with employees.

In short, the Board of Inquiry was presented with evidence on both sides of the central question as to whether Mr. Stanley Kowalewski had been motivated by feelings of racial discrimination in his dealings with Ms. Phyllis Ingram. In the following sections of this decision, the events giving rise to the appointment of this Board of Inquiry will

be considered in more detail. As a preliminary matter, however, it will be useful to consider briefly certain submissions made by Mr. Millward and Mr. D'Oliveira with respect to the legal burden of proof which rests with Ms. Ingram and the Ontario Human Rights Commission, the latter body having carriage of this complaint on behalf of Ms. Ingram pursuant to section 14(b)(1)(a) of the Ontario Human Rights Code.

II. The Burden of Proof

As a general matter, it is clear that a burden of establishing that the alleged acts of discrimination did in fact occur rests with Ms. Ingram and the Ontario Human Rights Commission. These parties carry the burden of persuading the Board of Inquiry that, on the balance of probabilities, decisions taken with respect to Ms. Ingram's employment by Mr. Stanley Kowalewski were motivated by discriminatory attitudes in contravention of the Ontario Human Rights Code. Although all counsel appearing before this Board of Inquiry seemed to be in agreement with the foregoing propositions, Mr. Millward and Mr. D'Oliveira made a number of submissions relating to the establishment of a *prima facie* case of discrimination and a resulting shift in the burden of proof to the respondent. It will be useful to explore briefly the general nature of the submissions and their significance for the matter at hand.

A rather elaborate analysis of the allocation of burdens of proof in matters of this kind, on which Mr. Millward and Mr. D'Oliveira rely, is to be found in a body of American case law, decided under Title VII of the Civil Rights Act of 1964, an American federal statute which is in

material respects similar to the Ontario Human Rights Code. In a leading American case, McDonnell Douglas Corporation v. Green (1973), 93 at S. Ct. 1817, the U.S. Supreme Court set out a four step analysis for determining the proper allocation of the burden of proof in cases where it is alleged that an employer has engaged in discriminatory hiring practices. Subsequent American cases have developed a modified version of this analysis to deal with situations, such as the present case, in which it is alleged that a dismissal has occurred on discriminatory grounds.

The analysis set forth in the McDonnell Douglas case was expressed by Mr. Justice Powell (at pg. 1824) in the following terms:

> "The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing
> (i) that he belongs to a racial minority;
> (ii) that he applied and was qualified for a job for which the employer was seeking applicants;
> (iii) that despite his qualifications, he was rejected; and
> (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of the complainant's qualifications."

Mr. Justice Powell went on to say that once a prima facie case of this kind has been established by the complainant, "The burden then must shift to the employer to articulate some legitimate, non-discriminatory reason for the employee's rejection."

Subsequent to the McDonnell Douglas decision, a number of American courts have attempted to modify Mr. Justice Powell's formula so as to render it applicable to cases of dismissal. See, for example, Long v. Ford Motor Co. (1974), 496 F. 2d 500; Potter v. Goodwill Industries (1974)

518 F. 2d 864. The effect of these cases has been summed up in Lawson on Employment Discrimination (Vol. 3, para. 86.40) as follows:

> "The formula as adjusted would be this: Plaintiff, in his prima facie case, must prove that he is 'qualified' in the sense that he is not disqualified by the conduct for which he was discharged, and, moreover, he must prove that the employer continued, not to 'seek' but to retain employees with the same disqualifications. The burden would then pass to the employer to prove that he had a legitimate, nondiscriminatory reason for the firing. If he succeeded, the plaintiff would finally have an opportunity to prove that the ostensible reason was in fact pretextual."

To put the matter more plainly, it is Lawson's view that if a complainant can show that he has been fired for a particular reason, and that other people to whom the same reasoning would apply, have not been fired, a legal burden would then be shifted to the employer to come forward and indicate that he had a "legitimate" or non-discriminatory reason for the firing. If the employer did come forward with such an explanation for the firing, it would then be up to the complainant to prove that the "legitimate" reason was not the real reason for the dismissal but was, in fact, merely a cover or mask for discriminatory attitudes which formed the real basis for the decision to dismiss.

It is unnecessary to dwell on the question of whether this American jurisprudence is applicable to the determination of a complaint brought under the Ontario Human Rights Code. Although it is my view that these decisions develop an analytical framework which could properly be used by Boards of Inquiry in assessing evidence brought before them, this analysis offers nothing to the complainant in a case such as the

present, where the respondent has, in fact, come forward and proffered a "legitimate" or non-discriminatory reason for the dismissal. In these circumstances, the ultimate burden of proving that the explanation offered by the respondent is a fictitious cover for discriminatory attitudes, rests with the complainant.

In short, the establishment of a prima facie case of discrimination is useful in shifting a burden to the employer to come forward and offer an explanation for the dismissal, which is not based on discriminatory considerations. Once the employer has come forward, however, the burden rests with the complainant to prove, on the balance of probabilities, that the explanation put forward is false and pretextual. It is this burden which rests with Ms. Ingram and the Ontario Human Rights Commission in the present case.

One further point should be noted. In his argument, Mr. D'Oliveira appeared to suggest that the "legitimate" reason put forward by the employer must establish that the dismissal was in some sense warranted or justified by the alleged misconduct of the employee. It is my view, however, that the proper test of the "legitimacy" of the reason proffered by the employer is simply that it is wholly unrelated to the prohibited grounds of discrimination. Thus, it may be that a particular employer would impose the sanction of dismissal on the basis of misconduct which most or many other employers would penalize in some less drastic way. Such a dismissal, even though it be harsh and even though it be one which could not be upheld under the terms of a typical collective agreement, would be immune from attack under the Human Rights Code, provided that the reasons for the dismissal were completely unrelated to the

grounds of discrimination prohibited by the Code. To accede to Mr. D'Oliveira's suggestion, would convert the Ontario Human Rights Code from an anti-discrimination statute to one which generally prohibits harsh or unwarranted dismissal of employees. This is a construction, in my view, which the Ontario Human Rights Code cannot reasonably be expected to bear. I would agree, however, with Mr. D'Oliveira's submission to the following extent. In a case where an employee has been dismissed on what appear to be rather insubstantial grounds, the employer is more vulnerable to the inference that the grounds put forward as an explanation for the dismissal are, in fact, pretextual.

III. Natural Footwear Limited, its Management and the Lasting Line

A brief account of the history of the respondent, Natural Footwear Limited, its management personnel, and the process by which shoes are manufactured on its premises, will be of assistance in understanding the chronology of events to be set forth below.

Natural Footwear Limited was established in 1973 by Mr. Don Green and Mr. Michael Budman, the latter of whom testified before this Board of Inquiry with respect to the growth and development of the company and its shoemaking operations. Messrs. Green and Budman, having no previous experience in the manufacturing of shoes, had resolved to attempt to produce a market a type of shoe, referred to as a "negative-heel shoe", ultimately marketed by the company under the tradename "Roots". In order to obtain expertise in the design and manufacturing of such a shoe, Green and Budman approached a small family-run shoe company

owned by John Kowalewski and his four sons, Richard, Stanley, Henry and Carl. Apart from members of the family, the Kowalewski factory had only one other employee at that time. The Kowalewskis designed and manufactured the "Roots" shoe and the shoe was first brought out onto the market in August of 1973. Shortly thereafter, Green and Budman entered into an arrangement with the Kowalewskis to purchase their business and to retain various members of the family as management personnel in the new operation.

The company enjoyed rapid and remarkable success. Mr. Budman described the Roots product as "the largest fad that has ever come into the shoe business." As a result, the manufacturing operation grew very quickly. Within a few years' time, the company employed something close to the work force of approximately 130 to 150 people it employs today.

The various members of the Kowalewski family are still involved in the business. The father, John Kowalewski, and his son Carl, are responsible for design of shoes for the company. The other sons are responsible, in effect, for the day-to-day operation of the manufacturing aspect of the company's operations. Richard Kowalewski is the plant manager. Reporting to him are his brothers Henry, who is in charge of the "fitting" room, and his brother Stanley, who is in charge of the "finishing, lasting and packing" operations. Mr. Budman testified to the general effect that he and Mr. Green do not involve themselves much in the daily administration of the plant. The authority to hire and fire employees, for example, has been delegated to the three Kowalewski brothers responsible for managing the plant.

According to Mr. Budman's testimony, the basic "Roots" shoe

constituted 100% of the company's shoe production until the early part of 1977. The "fad" had apparently trailed off in 1976 and the company began to introduce other lines of shoes and boots. In his testimony, Richard Kowalewski indicated that further innovations were introduced in 1978 with the introduction of something called the "Classic" line which marked a departure from the "negative-heel" concept on which all previous boots and shoes had been based. The Classic line consisted of various types of shoes which were more sophisticated in their design and more expensive to produce. The "Classic" boots and shoes have heels of a traditional kind and are manufactured, according to Mr. Kowalewski, from more expensive leathers than those used previously by the company.

At the time of the events giving rise to the present dispute, Mr. Kowalewski's evidence indicates that the daily production of the factory would typically be something in the order of 1300 to 1500 pairs of shoes per day. The process by which the shoes are manufactured is a relatively straight-forward one. Pieces of leather of the appropriate size and shape are prepared in the cutting room, an operation which is supervised by Richard Kowalewski in addition to his responsibilities as plant manager. The pieces of leather are stitched together in the sewing room operation, under Henry Kowalewski's supervision, and forwarded to the lasting room. The lasting operation involves, in effect, the assembly of the shoe. From the lasting line, the completed shoes are taken to be inspected, packed and shipped.

The supervisory responsibility for the lasting operation, as mentioned above, is that of Mr. Stanley Kowalewski. It was the lasting

line on which Ms. Ingram was employed during her career with Natural Footwear Limited.

The various stages of the lasting operation were the subject of considerable evidence before this Board of Inquiry and the relative difficulty of the various tasks involved was the subject of some controversy. It will be useful, therefore, to indicate briefly the general nature of the lasting operation and the manner in which it is organized at Natural Footwear Limited.

Parenthetically, it should be noted that the Board of Inquiry acceded to a motion by Mr. Cohen that a view should be taken of the premises of Natural Footwear Limited for the specific purpose of observing the lasting operation in action. Mr. Millward objected to this proposal for the exclusive reason that he did not feel it would be a useful expenditure of the Board's time. Mr. Millward did not object either that the proposed view would be prejudicial or that it was, in any way, beyond the powers conferred upon the Board by the Ontario Human Rights Code. The Chairman ruled that a view would be taken for the limited purpose of assisting in a proper appreciation of the oral testimony led before the Board of Inquiry. This would appear to be the proper limitation on the purpose for which a view may be taken in a civil proceeding covered by the Ontario Rules of Practice. See, Paul and Paul v. Fadden, [1953] O.W.N. 306; Chambers v. Murphy, [1953] O.W.N. 399. It was not necessary for the Chairman to determine whether a Board of Inquiry constituted under the Ontario Human Rights Code is strictly limited by this principle inasmuch as it was not suggested by Mr. Cohen that the view should have any broader purpose or function than this.

In the event, the Chairman attended at the premises of Natural Footwear Limited in the company of Mr. D'Oliveira, representing Ms. Ingram and the Ontario Human Rights Commission, and Mr. Cohen, representing Natural Footwear Limited, and observed the lasting process for a brief period of time. The following account of the lasting operation and the assembly line or "lasting line" which forms its central core, is based on evidence submitted at the hearings conducted by the Board of Inquiry.

A diagram of the lasting line operation submitted in evidence (Exhibit 2) indicates a nine-step process by which the shoes are assembled. The various pieces of the individual shoe are assembled around a "last", an object which roughly approximates the size and shape of the human foot which the shoe is supposed to fit. Before the individual lasts are placed on the assembly line, an insole is tacked onto the bottom of the last with the assistance of a machine referred to as the "insole-tacker". The person who operates the insole-tacker then forwards these lasts to the "Assembler," a person stationed on the assembly line who places the leather "uppers" or "tops" of the shoes on the upper side of the last. The Assembler then places the shoe on racks which are carried around automatically by the assembly line mechanism from one station on the line to the next. The operator at each station of the line can stop the progress of the individual rack while he or she works on the shoe in question. Once their operation is complete, the last is returned to the rack and put in motion once again to move on to the next station. The operator at each station on the line performs an operation on each shoe which involves the use of a particular machine.

After leaving the Assembler, the first stop is the toe lasting operation. This operator employs a machine which secures the front end of the shoe to the bottom of the insole and fits the toe leather snugly over the last. The next operation is that of "side-lasting," by which the sides of the shoe are similarly secured to the bottom of the insole. One of the witnesses, Mr. Sid Green, testified that this was the most difficult operation in the entire process. The fourth step in the process, as one might expect, is to secure the heel around the last in a similar fashion. The next step -- "roughing" -- involves something like a "sanding" process by which excess material is removed from the bottom of the insole. The sixth step involves the addition of cement to the bottom of the assembled shoe and the seventh step, "drying", involves matching the shoe up with an appropriately sized sole and sending the shoe through a drying process which will appropriately prepare the cement for the addition of the sole. The eighth step in the process involves the "pressing" of the sole onto the bottom of the shoe. The construction of the shoe now being completed, the shoes move on to the final station on the line, the last-pulling operation. It was this particular job -- "last-pulling" -- in which Phyllis Ingram was employed during all of her time as an employee of Natural Footwear Limited.

The function of the last-puller is to remove the last from the completed shoe. An automatic machine of some sort assists in "breaking" the last or bending it in such a way as to facilitate its removal from the shoe. Once this has been accomplished, the shoe is placed on a rack, ultimately to be carried over to the packing and shipping area. The

last is placed on a rack to go over to the insole tacker so that the process of manufacture may begin all over again. The individual racks which travel around on the assembly line are then released by the last-puller and forwarded on to station number one, where assembled shoes will be placed on the racks by the Assembler. It was generally agreed by all witnesses who testified with respect to this matter that the task of removing the lasts from the shoes was a more difficult matter in the case of boots. Apparently, in the case of some boots at least, it would be impossible to use the automatic equipment to "break" the last and this would make the job of removing the last more difficult.

Twelve employees are engaged in the lasting operation. One person operates the insole-tacker, and one employee is located at each of the nine stations on the line, with the exception of the cementing and sole-pressing operations, on each of which two employees are utilized.

IV. Phyllis Ingram and Natural Footwear Limited

The complainant, Phyllis Ingram, commenced work as an employee of Natural Footwear Limited on October 2, 1974. She was hired by Stanley Kowalewski to work as a last-puller. She remained at this position and under Stanley Kowalewski's direct supervision until her dismissal by Mr. Kowalewski on January 11, 1978. Both Ms. Ingram and Mr. Kowalewski appear to agree in their testimony that the first two and a half to three years of their relationship were completely satisfactory. Mr. Kowalewski indicates that Ms. Ingram was a very good worker and employee. Ms. Ingram had no complaint to make with respect to her treatment over

that period of time. Ms. Ingram received raises on six occasions during this period. Her hourly wage ultimately increased from a starting rate of $2.50 to $3.85 on December 20, 1976.

If Phyllis Ingram and Stanley Kowalewski agree that the first two and a half to three years of their relationship was quite satisfactory, however, they disagree in their evidence with respect to most other matters relating to this dispute.

As far as Mr. Kowalewski is concerned, problems with Phyllis Ingram's performance on the job began to develop after she returned from an extended vacation in the summer of 1977. Indeed, the first point of disagreement between Mr. Kowalewski and Ms. Ingram with respect to the facts relates to the arrangements under which this holiday occured. The practice of Natural Footwear Limited is to close the factory down for two weeks each summer, at which time the staff has its two-week holiday. Stanley Kowalewski testified that it was their practice at the company to not give a vacation of a longer period than this to employees. If an employee took a longer period of vacation, they would not be guaranteed a job upon their return. Mr. Kowalewski testified that Ms. Ingram asked his permission for an additional week of vacation in the summer of 1977. This request he denied, informing Ms. Ingram that she would not be guaranteed a job if she did not return at the usual time. Not only did Ms. Ingram not return after two or three weeks, Mr. Kowalewski testified, she returned some period of time thereafter and phoned him to see if she could come back to work. As he was in need of an employee at that time, he agreed to take her back even though it was his feeling that he was not under any obligation to do so.

Ms. Ingram has a very different view of the arrangements concerning the holiday. Ms. Ingram testified that she had asked for an extra month off in addition to the usual two weeks. Although Stanley Kowalewski had initially protested that "we need you", Ms. Ingram testified that he subsequently went away and returned to tell her that it was "okay" for her to go on this extended vacation. Ms. Ingram's evidence was that she returned after a five week absence (one week less than the approved holiday) and, after phoning Mr. Kowalewski to advise him or her return, came back to work.

According to Mr. Kowalewski's evidence, upon Ms, Ingram's return from this extended absence, her attitude and work performance deteriorated. Mr. Kowalewski testified (transcript, p. 189) that "her attitude was that of unhappiness. She was slow, she was -- she looked irritable, irritated. She wasn't really into the work as she was previous to that time." And further, (transcript, pp. 190-191), "She had argued with some of the other employees that worked in front of her or behind her. It wasn't a team anymore. The whole production in that lasting room, it is important that they all work together and help each other. If a person is working on the top tier, we have three tiers, he would try to make sure that the next operator would be helped and he would have the work also available in the same tier if he needed it. She would ignore things like that, almost deliberately, doing it to slow down the work." Mr. Kowalewski testified that he mentioned his concerns to Ms. Ingram a number of times and that Ms. Ingram was unresponsive. According to Ms. Kowalewski (transcript, p. 191) "at the beginning it was like she would just release a sigh and just ignore it. There would be no answer. Later on, the thing got progressively worse. She mentioned it to me that if I did not like it, I knew what I could do."

At Christmas time, Mr. Kowalewski awarded what he appeared to feel

were "merit" increments to some of his employees. He made no such award to Phyllis Ingram, he testified, for a number of reasons. He was unhappy with her work performance, with the length of time she took returning from her holiday and with her general attitude.

Shortly after the decision concerning the raise, on January 11, 1978, the culminating incident leading to Ms. Ingram's dismissal occurred. On the basis of Mr. Kowalewski's testimony, the incident developed in the following way. Shortly before the morning coffee break at 9:30 a.m., the "insole-tacking" machine broke down. Mr. Kowalewski and the factory mechanic, Mr. Tim Watts, made an effort through the period of the ten minute coffee break and for some short period of time thereafter to repair the machine. Having failed to do so, the decision was taken to use a "stapling" machine as a substitute for the insole-tacker. At a point of time approaching 10 a.m., this makeshift arrangement was commenced and the process of forwarding lasts to the Assembler with insoles "stapled" to them began. At this point, according to his evidence, Mr. Kowalewski noticed that Ms. Ingram wasn't working "very fast or at all" because there were very few racks available to the Assembler on which the assembled lasts could be placed for forwarding to the next station on the assembly line. There was no reason for this in Mr. Kowalewski's view. The breakdown in the insole-tacking operation did not reduce the volume of completed shoes approaching Ms. Ingram from the eighth station on the assembly line. In Kowalewski's view, Ms. Ingram had had plenty of time to fill up all three tiers with empty racks which would then be available to the Assembler. Mr. Kowalewski then approached Ms. Ingram and a conversation concerning this matter ensued. The following excerpt from Mr. Kowalewski's testimony indicates

his version of the ensuing exchange with Ms. Ingram (at p. 203 of the transcript):

> Q. What did you then do?
>
> A. Well, I went and approached Phyllis Ingram and I asked her why she couldn't pull-push the work. She had a lot of time to fill up that whole line, all three tiers. Instead, all I had was roughly ten empty racks which we could only put ten pairs on. She was very angry, you could see her just tensed up, and she said, "If you don't like it, you know what you can do." That wasn't the first time she mentioned that to me, so I asked her to come off the line to one side and I spoke to her again, that we need to get the shoes moving. We have the machine repaired. There should be no problem for her to push-pull out the lasts. She said, "If you don't like that, you know what you can do." I said, "Okay, okay, that's it. You'd better go home, you're fired. Punch your card out." That was it. She went --
>
> Q. Did she react? Did she say anything?
>
> A. She was very, very angry. I can understand she got very angry that I told her to do that. I mean she got away before telling me these things. We walked towards the clock, she punched her card. She told me I am going to be very sorry and I am going to hear about this. She then returned to get her coat and bag and I waited by my office and she came back out. I saw her again and she said,"You're going to be very, very, very sorry," and walked out of the building.

Ms. Ingram's time card for January 11, 1978 was tendered as an exhibit. It indicates that the card was punched out at 10:05 a.m.

Although Mr. Kowalewski affected some shyness on this point in his examination in chief, he indicated on re-examination by Mr. Cohen that he took Ms. Ingram to mean by the expression "you know what you can do" that she was saying in effect, "you can shove the job. That's what I felt like she meant. You can shove it." (Transcript, p. 253.)

Ms. Ingram's version of the events leading up to the January 11th incident as well as her evidence of the incident itself, varies dramatically from that of Mr. Kowalewski. According to Ms. Ingram's testimony, the first sign of any difficulty in her relationship with Mr. Kowalewski arose in October of 1977, some time after she had returned from her holiday, when she sprained her foot. Ms. Ingram sprained her foot on the way home from work on October the 5th. She then took two weeks off work to recover and returned on the 17th of October. When she returned, according to her evidence, she continued to have some difficulty standing all day and by evening would find that her foot was swollen. On October 25th, she was asked by Stanley Kowalewski to work overtime and she declined to do so on the basis that her foot was sore. On the next day, according to her evidence, she came into work to find that her time card had been removed from the rack in which the time cards are kept. She protested the absence of the card to Stanley Kowalewski, and he is alleged to have replied that he had taken out her card because she had refused to work overtime. Ms. Ingram testified that she protested this treatment to Richard Kowalewski, the plant manager, and, when she returned to work the next day, found that her time card was back in the usual place and that a hand-written indication of a normal time for her arrival and departure had been written on the card.

Ms. Ingram testified further that she was asked by Stanley Kowalewski to work overtime the next week and that when she declined for the same reason to do so "he walked away." Subsequently, Ms. Ingram was asked to work overtime and it was her evidence that she did so.

Ms. Ingram indicated in her evidence that she felt that this incident was an instance of discrimination on the basis of colour and that similar treatment would not have been accorded a "white" employee. For his part, Mr. Kowalewski testified that he did not recall this incident although he did remember that Ms. Ingram had suffered a sprained foot and that he had, at the time, believed in the genuineness of her disability and accepted it as a basis for her absence from work.

The other major incident prior to her dismissal which Ms. Ingram cited as evidence of discriminatory treatment related to the decision by Stanley Kowalewski not to award her a raise at Christmas time. It was Ms. Ingram's evidence that, with one other exception, every other employee on the lasting line had received a raise at that time or so, at least, she says she was advised by all other employees. The one exception was Betty Buchanan, the operator of the insole-tacker, who was awarded an increase, according to Ms. Ingram, only after protesting to Stanley Kowalewski that her failure to obtain a raise was unfair. Ms. Ingram protested at the same time but was not successful in persuading Mr. Kowalewski to change his mind. Ms. Ingram professed to be particularly outraged by the absence of a raise and, ultimately, by her dismissal inasmuch as she was a hard worker. Indeed, she testified that "I work harder than everyone who is inside that factory." (Transcript, p. 27) Ms. Ingram indicated that it was her opinion that her job was harder because she did the last pulling job by herself. Work was fed to her by two operators in the sole-pressing operation. Stanley Kowalewski continually refused, as far she was concerned, to provide needed assistance with the last pulling.

"Everybody has to work hard," said Ms. Ingram, "but I worked more because I have to work faster than everyone." (Transcript, p. 57)

As Ms. Ingram saw the matter, her best efforts were unavailing. Stanley Kowalewski complained about her work and refused to provide the assistance she needed. When she protested the absence of a raise, he is alleged to have said that he could obtain someone to do the job at half her wage. Ms. Ingram testified that she replied to this remark that Mr. Kowalewski would have to hire two people to replace her. She further testified that she was vindicated in this view by the fact that when she was ultimately dismissed by Mr. Kowalewski, it was necessary to employ two people in the last pulling operation. In his evidence, Mr. Kowalewski denies that this exchange took place.

According to Ms. Ingram, neither her work performance nor her attitude towards Mr. Kowalewski was affected by these frustrations and disappointments. She continued to work in the same way and, in particular, it is her evidence that on the Monday and Tuesday immediately preceding the Wednesday of January 11th when she was dismissed, she continued to work at the usual rate of speed. Nonetheless, Mr. Kowalewski continued to complain to her about her performance.

Ms. Ingram's version of the incident leading to her dismissal is the following. Although she does not deny that the work had backed up to some extent at her work station, this was attributable to two factors. First, Ms. Ingram had occasion to go to the washroom after the coffee break. According to her evidence, this occupied her for two to three minutes (Transcript, p. 69). Secondly, she was engaged in pulling boots that morning and the pulling of boots, being more difficult, makes

it more difficult to keep up with the work. Although some of Ms. Ingram's evidence with respect to this point is a bit vague, the following exchange from the transcript indicates that the fact that she was pulling boots was advanced by her as an excuse for the problem at the last pulling station (Transcript, p. 70-71).

> Q. Are you saying the reason that Gerry [the Assembler] had no or a few racks is because you were working on boots?
>
> A. Gerry had a few empty racks.
>
> Q. Because?
>
> A. Because the boots were hard to take off. They take time to take off the boots --
>
> Q. You say you were working on boots? I understand it takes a longer time?
>
> A. Right.

In response to Mr. Cohen's questions, Ms. Ingram went on to provide the following account of the exchange which then occurred with Mr. Kowalewski.

> Q. Did Stan ask you for an explanation as to why there were no racks for Gerry?
>
> A. No, he didn't. He didn't ask me nothing. He only just come up — he didn't ask me nothing --
>
> Q. What did he say?
>
> A. He just come up to me and say, "The line is stopped." I say, "Yes, the line is stopped. Everytime the line is stopped you get somebody to help me clear the line." He say, "Okay, Phyllis, go and punch your card and go. I want to get rid of all your people."

It is, for obvious reasons, this last alleged statement of Mr. Kowalewski which Ms. Ingram suggests is evidence of Mr. Kowalewski's discriminatory attitude. In his evidence, Mr. Kowalewski denies that he made a state-

ment of this kind or referred in any other way to Ms. Ingram's race or colour in his conversation with her on the morning of January 11th.

Given the importance of this allegation for the matter in dispute, it should be pointed out that the account Ms. Ingram gave of this alleged statement of Mr. Kowalewski's was slightly different in her examination in chief. In response to Mr. Millward's questioning, (Transcript, p. 27) Ms. Ingram testified that Mr. Kowalewski had said, "I want to get rid of all you people." On further questioning, she indicated that she understood him to mean by this that she was being dismissed because she was black.

A slightly different version of this exchange was portrayed in the complaint (Exhibit 1). The paragraph reads as follows:

> On January 11, 1978, I had occasion to go to the washroom and as usual, when I returned three minutes later, the line was piled up. Stanley made no attempt to get someone to help me when I asked. Instead he told me I was fired. He further told me, "Go home. I want to get rid of all of you." By this, I took him to mean all the blacks in the factory.

The significance in the variation of these accounts of this alleged interchange is a matter which will be considered at greater length in the next section of this decision.

In sum, then, the evidence of Phyllis Ingram and the evidence of Stanley Kowalewski differ on a number of points which are of importance to the resolution of this dispute. Ms. Ingram's evidence, if it be accepted in its entirety, would suggest (i) that she was subjected to oppressive or unfair working conditions, (ii) that she was the victim of a completely unwarranted dismissal, and (iii) that on the occasion of her dismissal a remark was made which might be interpreted as a reference to race. These facts are said to constitute evidence of a discriminatory attitude on the

part of Mr. Stanley Kowalewski. Mr. Kowalewski's evidence, if it be accepted, suggests that the basis for his treatment of Ms. Ingram at work and, in particular, for the January 11th dismissal was exclusively to be found in matters of her work performance and attitude, and had nothing at all to do with racial discrimination.

V. An assessment of the evidence relating to the Ingram dismissal

It is a difficult matter for an adjudicator to weigh the conflicting evidence of two witnesses, both directly involved in the events in question, who have recounted their version of the events with the apparent conviction that their own version of the story is a truthful one. In attempting to assess the reliability of the testimony of each witness, it will be helpful to consider the evidence of other witnesses presented to the Board of Inquiry relating to these events and to look, more generally, at what the evidence led before this Board of Inquiry suggests is the nature of the context in which these events have occurred.

Turning first to a consideration of the evidence of Ms. Phyllis Ingram, it must be said that there are a number of aspects of Ms. Ingram's testimony which give to rise to concerns as to its general reliability.

First, a careful review of Ms. Ingram's evidence suggests that she is neither a terribly accurate observer of events nor an individual with a very precise recollection of past events. Thus, there were a number of minor factual inaccuracies in Ms. Ingram's evidence relating to

the size of the work force at Natural Footwear and the timing of the coffee break. More troubling, however, were erroneous statements concerning the granting of raises on the lasting line. Ms. Ingram first testified quite forcefully that she was the only person not to receive a raise at Christmas time in 1977. She then conceded on cross-examination that one individual, Ms. Buchanan, had received a raise only after protest. In fact, however, the evidence before this Board of Inquiry, both documentary and otherwise, establishes that nine of the thirteen employees on the lasting line did not receive raises at Christmas time.

Ms. Ingram testified that all of her co-workers on the lasting line had advised her that they had received a raise at Christmas and that they expressed surprise that she had not done so. It seems improbable that each of these nine individuals did so advise Ms. Ingram. Nonetheless, it is at least conceivable that some of Ms. Ingram's confusion on the issue of raises results from an inaccurate perception of what others had advised her at the time or from a willingness on Ms. Ingram's part to draw inferences from partial information which were not consistent with the true facts. Moreover, there was an element of fact relating to the question of raises which no doubt was underlying Ms. Ingram's concern. She was, in fact, the only employee on the lasting line who had not received a raise for twelve months. Raises were given at irregular intervals through the year to employees who were thought to be especially deserving. Ms. Ingram had received frequent raises in the past and it is not surprising that she was very concerned that she did not receive one approximately twelve months after her last raise.

If Ms. Ingram's testimony concerning the Christmas raises incident can be explained in part by good faith error, this aspect of her testimony also suggests the presence of an inclination to construe or exaggerate her circumstances in such a way as to confirm her feelings that she is being unfairly treated. This difficulty is evident also in Ms. Ingram's testimony relating to the difficulty of her job and the extent to which she was required to work harder than anyone else in the factory. It is simply not true that Ms. Ingram had the most difficult work assignment in the Natural Footwear Limited plant. Mr. Sid Green, a co-worker on the lasting line, whose evidence on this point I accept, indicated that the side lasting job was much more difficult. Mr. Richard Kowalewski, who had been responsible for the design of the assembly line, testified (Transcript, p. 347) that the last pulling job is the easiest job on the assembly line. In his view, it involves the least amount of skill and is the fastest operation to perform.

Ms. Ingram testified that she was, in effect, doing the work of two people. This appears not to be true. It may have been Ms. Ingram's genuine feeling that this was the case, of course. Nonetheless, Ms. Ingram suggested in her evidence that other jobs on the line were done by two people whereas she was left to perform the last pulling operation on her own and that this demonstrated the excessive nature of her work assignment. In fact, many of the jobs on the lasting line are performed by one operator. Further, Ms. Ingram was under the impression that she had been replaced by two people and that this offered further support for her view of the difficult nature of her job. In fact, however, although there was a period of time during which

a new (and unsuccessful) last puller was assisted, on a part-time basis, by a second worker, the job is currently being performed by one individual, Mr. Russ Khan. Mr. Khan testified before this Board of Inquiry and indicated that he is having no difficulty performing the last pulling operation by himself. He indicated that he is able to avoid blocking the line when he goes to the washroom by working ahead a bit before leaving the line. As well, he testified that he had only required the assistance of someone else on one or two occasions, for fifteen minutes or so each time, when he first began working at the last pulling position. Obviously, Mr. Khan's evidence tends to support the view of other witnesses that the last pulling job is not as burdensome as Ms. Ingram suggested in her evidence. Moreover, the ability of Mr. Khan to do the job does suggest that if, indeed, there was a reluctance on the part of Mr. Stanley Kowalewski to provide assistance to Ms. Ingram when she asked for it, that reluctance could reasonably be based on the assumption that the job could be handled manageably by one person.

Finally, the most troubling signal of unreliability in Ms. Ingram's evidence relates to the events leading up to the incident on January 11th, 1978. Ms. Ingram testified that her work performance and attitude towards Mr. Kowalewski were not altered in any way by her frustrations over the lack of a raise in her pay. Thus, it was in her view unfair of Mr. Kowalewski to complain about her work performance on the Monday and Tuesday of the week in which she was fired. I am satisfied on the basis of the evidence of other witnesses that Ms. Ingram's representations in this respect are simply false. Mr. Gerry Carinci, who was the Assembler at all material times and therefore in a good position to observe Ms. Ingram's work, testified that on the morning of January 11th

and for some period of time previously, Ms. Ingram was not performing her work properly. Mr. Carinci indicated that she had been very moody and angry during the period from Christmas to January 11th, and that her work had slowed down considerably. In Mr. Carinci's opinion, Ms. Ingram was difficult to talk to during this period. She would "snap at you" and she sometimes would "mutter" to herself. On the morning of January 11th, Mr. Carinci testified, Ms. Ingram was working very slowly and he was having difficulty getting racks in order to carry on his work as the Assembler. Mr. Carinci appeared to be a fair-minded and truthful witness. In other respects, his evidence was supportive of Ms. Ingram. I accept that these events transpired more or less in the way in which he described.

Further, it should be noted that the company production records indicate that no boots were in production on January 11th, 1978. Ms. Ingram's explanation that she was slowed down on that morning by boot production appears to be false.

The portrayal of the events leading up to and including the incident on January 11th which Ms. Ingram offered in her evidence is very different from what I have found to have occurred in fact. Ms. Ingram's evidence on these matters appears to have been intended to mislead the Board of Inquiry and to provide support for her allegation that Mr. Kowalewski was motivated by discriminatory feelings in his decision to terminate Ms. Ingram's employment with Natural Footwear Limited.

Against this background, it becomes very difficult to place confidence in Ms. Ingram's complaints of unfair treatment and, in particular, in her account of the conversation with Mr. Kowalewski at the time of her dismissal on January 11th. In this respect, I believe, it is important to note the variety of the different versions of the statement attributed

to Mr. Kowalewski by Ms. Ingram. She has indicated variously that he stated that he wanted to fire "all of you", or "all of you people" or "all of your people". The first version of this phrase, which was referred to in the Complaint as the phrase which Mr. Kowalewski used, is evidently somewhat ambiguous. "All of you" might be taken to refer to a particular type of worker, e.g. "those who work slowly", rather than a particular type of person in terms of racial or ethnic origin. No doubt it is for this reason that the Complaint goes on to say,"by this I took him to mean all the blacks in the factory." The versions of the statement given by Ms. Ingram in her oral testimony for this Board of Inquiry, however, become progressively less ambiguous. If Mr. Kowalewski had indeed said that he wanted to get rid of "all of your people," it would be easy to interpret such a remark as indicating a racial bias. In view of the signals of unreliability indicated above with respect to Ms. Ingram's evidence -- difficulties in the accuracy of her observation and recollection of the facts, a tendency to misrepresent material facts so as to support her theory of discriminatory conduct -- I would not be disposed to find that Mr. Kowalewski made a racist remark on the basis solely of Ms. Ingram's evidence.

As far as Mr. Stanley Kowalewski's evidence is concerned, one may also perceive some difficulty in accepting his testimony as a completely accurate account of all of the events in dispute. As Mr. Millward pointed out in argument, Mr. Kowalewski indicated that he could not remember most of the incidents referred to Ms. Ingram. And, as Mr. Millward argued, whatever opinion one might take of the general reliability of Ms. Ingram's evidence, it does seem unlikely that she would completely fabricate the occurrence of such events as the dispute arising from her refusal to work during the time when she had a sprained

foot, the argument she had with Mr. Kowalewski concerning her raise at Christmas time, and so on. On the other hand, as Mr. Cohen argued, it is conceivable that these events, whatever their details were in fact, did not have a great deal of significance for Mr. Kowalewski and therefore did not form a profound impression upon him.

Further, other witnesses did not apparently share Mr. Kowalewski's view that Phyllis Ingram was working slowly during the fall. As Mr. Cohen pointed out, however, Mr. Kowalewski could be in exclusive possession of the facts relating how co-operative Ms. Ingram was with him during this period and, if his evidence be accepted, Ms. Ingram's attitude loomed large as a reason for denying her a raise.

Apart from the evidence of the two principal participants in the January 11th incident, attention may be drawn to other factors which, in my view, offer some limited support forthe thesis that it is unlikely that Mr. Kowalewski was motivated in any way by racial discrimination in his decisions relating to Phyllis Ingram.

First, it may be noted that Mr. Kowalewski and Ms. Ingram worked well together for a period approaching three years. It is not inconceivable tha Mr. Kowalewski suppressed racist or discriminatory feelings for all that ti and that these feelings only had occasion to surface in the last few months Ms. Ingram's employment when confronted by what he viewed as defiant or unc operative conduct. Accordingly, this long history of apparently satisfacto contact is not of much weight. Neither, in my view, is it entirely immater

Secondly, it should be noted that other black employees who worked directly under Mr. Kowalewski's supervision testified before this Board of Inquiry that they did not feel he was a person who acted on the basis of discriminatory attitudes. Ms. Cecelia George testified that she not only did not see any evidence of discrimination, but that she found Stanley

Kowalewski to be an easy person to work for. Ms. Betty Buchanan, the operator of the insole-tacker and thus located directly next to the last pulling station, indicated that she saw no evidence of discrimination against blacks at the factory. At the time of the hearing in this matter, Ms. Buchanan had occupied this position for five and a half years. It may be that it would be unwise to rely exclusively on the evidence of existing employees with respect to such matters. On the other hand, this evidence certainly does nothing to support the theory advanced by Ms. Ingram and the Ontario Human Rights Commission.

Finally, it may be noted that Mr. Kowalewski has dismissed quite a substantial number of non-black employees during his time as a supervisor. It was his evidence that he had dismissed 31 employees all told, and of these, only one, that being Phyllis Ingram, was a black employee. Although, as will be seen in the next section of this decision, Mr. Millward and Mr. D'Oliveira argue that Mr. Kowalewski was involved in one and perhaps two other dismissals of black employees, there is little evidence in these statistics that Mr. Kowalewski was indulging in a personal vendetta against black employees. As there was some considerable weight placed on evidence of this kind by Mr. Millward and Mr. D'Oliveira, however, the next section of this decision will be devoted to a consideration of that evidence and an explanation of my conclusion that it is ultimately not of assistance in evaluating the allegations made against Mr. Stanley Kowalewski with respect to his dealings with Phyllis Ingram.

In summary, then, I am persuaded for the foregoing reasons that the evidence of Phyllis Ingram relating to the events leading up to and culminating in her dismissal on January 11, 1978, cannot be relied on as a satisfactory basis for concluding that Mr. Kowalewski premised his decisions relating to either the term and conditions of Ms. Ingram's

employment or her dismissal either exclusively or in part on attitudes of racial bias or discrimination. I am persuaded, and I so find, that Ms. Ingram was not working conscientiously at least for a short time prior to her dismissal and certainly on the morning of January 11th. I find also that the sole motivating factor in Mr. Kowalewski's decision to deny Ms. Ingram a raise and, ultimately, terminate Ms. Ingram's employment was his concern with her defiant attitude and unco-operative approach to her work.

I might add, however, that it is no part of this decision that Mr. Kowalewski was completely justified in imposing the sanction of dismissal on Ms. Ingram. As Mr. Cohen himself conceded, it may be that another employer would have adopted a less harsh measure in response to Ms. Ingram's misconduct. Moreover, it is not beyond the realm of possibility that the deterioration in Ms. Ingram's work performance and general attitude was contributed to by insensitive handling by Mr. Kowalewski and by the apparently rather chaotic administrative practices which prevailed at the plant. Ms. Ingram may have been quick to perceive racial injustice. It is not surprising, however, that in the absence of settled and written policies with respect to such matters as holidays, raises and so on, Ms. Ingram apparently suffered from some misconceptions as to what the company practices and policies were with respect to matters of this kind. Whatever deficiencies there may have been in Mr. Kowalewski's performance as a supervisor and manager, however, there is not a persuasive basis established in the record before this Board of Inquiry for the conclusion that such practices were motivated by feelings of racial discrimination or were particularly directed at one racial or ethnic group.

VI. Evidence Relating to Other Dismissals

As indicated above, Mr. Millward and Mr. D'Oliveira placed considerable emphasis on evidence relating to other dismissals of black employees which occurred at Natural Footwear Limited in an attempt to support the thesis that the Kowalewski brothers, Stanley included, had embarked on a program of dismissing black employees. Much the greater part of the evidence led before this Board of Inquiry was advanced in support of this thesis. Needless to say, a theory of this kind is very difficult to support on the kind of evidence that is likely to be available to an inquiry of this kind. If such a plan or practice had developed at Natural Footwear Limited, it is most unlikely that any of the principals would reveal their intentions in front of potential witnesses or would straightforwardly testify with respect to such matters before a Board of Inquiry established under the Ontario Human Rights Act. In the nature of things, it is likely that such a proposition could only be supported by indirect evidence suggestive of something beyond mere coincidence with respect to employment decisions taken with regard to a particular type of employee.

Mr. Millward and Mr. D'Oliveira have brought forward evidence of two different kinds in support of this thesis. First, evidence has been led with respect to the number of black employees in the work force at various points in time at Natural Footwear Limited and emphasis has been placed on the fact that at the time when Phyllis Ingram was dismissed

from her job at Natural Footwear the number of black employees had declined to an extent which, they argue, is significant in the sense that it reflects some conscious desire to accomplish this objective. Secondly, a number of black former employees of Natural Footwear were called to testify. In each case, it was the opinion of the individual in question that their dismissal was unwarranted. Further, each of these witnesses felt that there was some evidence of attitudes of racial bias on the part of one or another of the supervisory personnel at Natural Footwear Limited.

The evidence led by Mr. Cohen on behalf of Natural Footwear Limited in response to these allegations was, in essence, evidence tending to show that the dismissals in each case were based on considerations other than those of racial discrimination.

Before turning to consider briefly each of the contentious dismissals discussed in this testimony before this Board of Inquiry, two preliminary points may usefully be made. First, the difficulties which I have suggested inhere in assessment of evidence of this kind, are substantially compounded in the present case by the fact that Mr. Stanley Kowalewski, whose attitudes are the central concern of this inquiry, was not in any way involved in most of these dismissals. Indeed, it is my conclusion that Mr. Kowalewski is not responsible for the decision taken in the one or two cases in which he may be said to have a connection to the dismissal in question. Thus, for the most part, the evidence led with respect to these dismissals does not suggest that Stanley Kowalewski conducted himself in a way which is consistent with discriminatory attitudes. Rather, the contention is to the effect that other members of the Kowalewski family who were supervisory personnel

so conducted themselves and that this, in turn, should give rise to the making of an inference concerning Stanley Kowalewski's state of mind at the time when he decided to dismiss Ms. Ingram.

Secondly, Mr. D'Oliveira made a number of submissions with respect to the potential relevance of statistical evidence in a matter of this kind. It was Mr. D'Oliveira's submission that in view of the difficulty in obtaining direct proof of overt racial discrimination in employment cases, a court or other adjudicatory body attempting to determine whether discriminatory acts have occurred should be prepared to examine evidence which is not specific to individual incidents but is, rather, evidence of a general character relating to patterns of conduct on the part of employers which tend to show the presence of policies having a discriminatory content.

Mr. D'Oliveira placed reliance on an American case dealing with a similar problem under Title VII of the U.S. Civil Rights Act, in which the court stated that, "... it is now well established that courts must also examine statistics, patterns, practices and general policies to ascertain whether racial discrimination exists." See Brown v. Gaston County Dyeing Machine Company (1972) 457 F. 2d 1377 at p. 1382. The Brown case, it should be noted, is a case in which statistical evidence was relied on to demonstrate that a plaintiff class was being discriminated against by the promotion and hiring practices of the defendant company. This class action had been coupled with an individual complaint of specific discriminatory treatment, but this latter complaint had been dismissed as unsupported by the evidence. The class action continued, however, and it was the holding of the court in Brown that on the resolution of a matter of this kind, it would be perfectly proper to

examine statistical evidence tending to show that certain employment practices had resulted in lack of what would appear to be a statistically reasonable rate of success within the company's employ.

The present case is not, of course, a class complaint raising an issue of this kind. The complaint brought by Ms. Ingram is very specifically related to the manner in which she has been treated by Mr. Stanley Kowalewski. In the resolution of a specific grievance of this kind, statistical evidence relating to the employment practices of the respondent may not bear precisely the same relevance to proof of the allegations involves as it does in cases such as Brown.

Nonetheless, I do agree with Mr. D'Oliveira's submission that statistical evidence of the kind he has pressed upon this Board of Inquiry may be of some relevance to the determination of the issues raised in Ms. Ingram's complaint. Just as it may be of some limited relevance to note that Mr. Stanley Kowalewski appears to have had satisfactory employment relationships with a number of black employees, so too it may be helpful in assessing the credibility of the evidence relating to a particular dismissal to note that a significant number of dismissals have been visited upon the members of a particular racial or ethnic group. Indeed, it may be that in an appropriate case, statistical evidence of this kind might be said to give rise to a prima facie case which would shift a burden of proof to the employer to lead evidence to demonstrate that the statistical evidence is to be explained on other than discriminatory grounds.

With specific reference to the present case, however, it should be noted that it is not necessary to determine whether a prima facie case of this kind has been established. The employer

has, indeed, come forward with evidence in response to the allegations deriving from these statistics. Accordingly, the question which arises here is not whether statistics alone give rise to the inference that there were widespread practices of discrimination at Natural Footwear Limited, but rather whether, on the basis of all the evidence led at the inquiry with respect to these matters, the complainant and the Ontario Human Rights Commission have established, on the balance of probabilities, that such practices have in fact occurred.

Again, presuming that the existence of a pattern of discriminatory practices was established on the evidence, it would then be necessary to take the next step of drawing a connecting link between the existence of the general practice and the particular incident in question. To take an illustration from the present case, even if it were established that discriminatory practices were occurring at Natural Footwear Limited, it would be possible for the Board of Inquiry to conclude that Mr. Stanley Kowalewski was untouched by wrongdoing of this kind and, in fact, was acting on the basis of non-discriminatory attitudes with respect to the incident in question. In other words, the existence of such a practice might be relevant, but it would not be dispositive of the issue relating to the specific incident. By way of contrast, in the case of a class action, such as that adjudicated in the Brown case, the establishing of the fact that the practice existed would settle the matter in favour of the plaintiff class.

In the present case, I am not persuaded that the complainant and the Ontario Human Rights Commission have made out the case that a pattern of dismissals linked by a discriminatory motivation has occurred. In

order to indicate the basis for this conclusion, it will be helpful to review briefly the evidence relating to the dismissals of those black former employees who testified before this Board of Inquiry. Attention will then be turned to the raw statistics on which the complainant and the Ontario Human Rights Commission rely.

Four former employees, all of whom are black, testified that they had been dismissed and that they felt there was some evidence of discriminatory practice at Natural Footwear Limited. Not each of these employees testified that their own dismissal was somehow to be explained on discriminatory grounds, but each of these witnesses was of the view that there was some evidence of discriminatory treatment either involved in their own dismissal or in some other treatment accorded them at Natural Footwear Limited.

The first of these witnesses, Hazel Nembhard, was fired after working for approximately three years at Natural Footwear as a stitcher in the sewing room under the direct supervision of Henry Kowalewski. The principal illustration of discriminatory practice advanced by Mrs. Nembhard related to what she saw as unfair criticism of her with respect to her attendance record. She felt that white employees would not be criticized in the same way that she was. There was, however, evidence led before this Board of Inquiry to the effect that Mrs. Nembhard did have a very poor attendance record. Moreover, one of Mrs. Nembhard's co-workers testified that she was someone who spent a lot of time talking on the job. An evidentiary basis has not, I believe, been established before this Board of Inquiry which would warrant a finding that Mrs. Nembhard had been treated in a discriminatory fashion.

A second black employee dismissed by Henry Kowalewski, Mrs. Veronica Marsh, testified to the same general effect as Mrs. Nembhard. It was Mrs. Marsh's view that she was unfairly criticized for her lateness. Again, however, there was evidence led before this Board of Inquiry to the effect that Mrs. Marsh had a very poor attendance record. Richard Kowalewski testified to this effect. Further, a photocopy of a memorandum to Veronica Marsh from Henry Kowalewski was filed as an exhibit. The memorandum warned Mrs. Marsh that if her punctuality and working habits did not improve that her employment would be terminated. Mrs. Marsh was fired six weeks or so after the date indicated on this memorandum. Additionally, a co-worker from the sewing room testified that Mrs. Marsh talked a lot on the job and was inclined to spend a long time in the washroom. Again, I am not persuaded that the record before this Board of Inquiry establishes that discriminatory attitudes played a role in Mrs. Marsh's treatment at Natural Footwear Limited.

A third black employee dismissed by Henry Kowalewski, Mrs. Marlene Harvey, testified that her dismissal was evidence of discrimination inasmuch as she was fired simply because she had failed to attend work one day when she was ill. Mrs. Harvey did not think that white employees would be fired in similar circumstances. Again, however, there was evidence led before this Board of Inquiry that Mrs. Harvey had a very poor attendance record. Mr. Richard Kowalewski testified on this point and submitted some documentary evidence in support of this proposition. As well, a co-worker testified that all she could remember about Mrs. Harvey was that she "used to be late in the mornings." Again, it is my view that there is not enough evidence in the record before this Board of Inquiry

to warrant the conclusion that Mrs. Harvey was dismissed on discriminatory grounds.

The fourth dismissed black employee, Mr. Sid George, presented a more complex picture. First, it must be noted that Mr. George worked under the direct supervision of Mr. Stanley Kowalewski. Further, although Mr. George appeared to be pleased with his relationship with Mr. Kowalewski up until the time of his dismissal, it was his view that since his dismissal was completely unwarranted, there must be some discriminatory attitude underlying the decision to dismiss. I am satisfied, however, that on the evidence before me, it would appear that the decision to terminate Mr. George's relationship with Natural Footwear Limited was taken by Mr. Richard Kowalewski. The culminating incident, as a result of which Mr. George was dismissed, occurred at a time when Stanley Kowalewski was absent from the plant and Mr. Richard Kowalewski was in charge of the lasting operation.

Both Richard Kowalewski and Stanley Kowalewski testified to the general effect that the basis for dismissing Mr. George related to the quality of his work performance. The evidence relating to this issue was more complex than in the other dismissal cases inasmuch as it was clear that in many respects, Mr. George was a cherished and highly valued employee. Mr. George was alleged to be a very fast worker and one who, through his ability to work on the various machines on the lasting line, was capable of filling in where needed and ensuring that production speed was maintained. For this reason, Stanley Kowalewski was an admirer of Mr. George's and it is apparent that Mr. George realized that his efforts were appreciated. Against this background, Mr. George professed

astonishment that he should be dismissed on the basis of a work performance problem.

The specific problem alleged by both Richard and Stanley Kowalewski with respect to Mr. George's work was that Mr. George sacrificed quality to speed. They indicated that in his haste he would make mistakes resulting in the necessity of destroying shoes that he had worked on. This alleged "quality" problem was said to be not as serious a matter prior to the introduction of the so-called "Classic" line, an innovation which required more sophisticated work and involved the use of more expensive materials.

The culminating incident recounted by Richard Kowalewski related to what Richard Kowalewski viewed as careless work on Mr. George's part. Mr. Kowalewski was approached by Mr. Fidale, the recently appointed foreman of the lasting line, who complained to Mr. Kowalewski that he was having trouble with Mr. George, and showed Mr. Kowalewski a damaged pair of shoes that he said Mr. George had worked on. Mr. Kowalewski asked for further evidence of this problem and after being shown a substantial number of shoes that were damaged in a similar fashion, Mr. Kowalewski called Mr. George into the office and after a brief exchange indicated that he was being suspended from his employment at Natural Footwear.

Upon Stanley Kowalewski's return to work, Richard Kowalewski advised him of these events. It is the evidence of both brothers that Stanley indicated at this time that he did not wish to dismiss Mr. George. Richard Kowalewski testified that he was of the view that Stanley's judgement in this matter was clouded by his friendship with

Mr. George. Accordingly, Richard Kowalewski prevailed on Stanley to dismiss Mr. George and asked Stanley Kowalewski to communicate this fact to Mr. George as he was the supervisor responsible for his department.

Mr. George's evidence would suggest that although he feels that his dismissal was unwarranted, it is nonetheless true that he was having some difficulty with the foreman, Mr. Fidale. Indeed, Mr. George suggested that many of the shoes shown to Richard Kowalewski as having been damaged by Mr. George were in fact damaged, perhaps, by Mr. Fidale himself. Moreover, Mr. George testified that Mr. Fidale was critical of his work performance and that he felt this criticism was unwarranted. Mr. George's evidence relating to his relationship with Mr. Fidale was somewhat inconsistent. When it was indicated to him in cross examination by Mr. Cohen that "conflict with the foreman" was suggested as one of the reasons for his dismissal, Mr. George protested that he had no conflict with the foreman at the time of dismissal and was working well with him. However, given Mr. George's assumption that whatever problems did exist were attributable to Mr. Fidale's deficiencies, it is perhaps not surprising that Mr. George would be reluctant to see this problem as a basis for his own dismissal.

On balance, then, I am persuaded that a case that the dismissal of Mr. George was based on discriminatory attitudes has not been made out. I accept the substance of the evidence of the Kowalewski brothers that they did share some concern about the work performance of Mr. George. Indeed, Mr. George himself was prepared to concede on cross examination that it was entirely possible that Richard Kowalewski had been misled by Mr. Fidale and that Richard genuinely believed that Mr. George was responsible for defective workmanship on a significant number of

shoes. It is not necessary for me to decide whether Mr. Fidale was acting duplicitously in this matter. It is sufficient, for the purposes of the present dispute, to reach the conclusion that such views were held by Mr. Richard Kowalewski and that they formed the basis for his decision to terminate Mr. George's contract of employment.

By way of summation, then, the evidence led before this Board of Inquiry relating to the dismissals of Mrs. Nembhard, Mrs. Marsh, Mrs. Harvey and Mr. George do not, ultimately, lend persuasive support for the view that the Kowalewski brothers had embarked on a plan of dismissing black employees for discriminatory reasons.

Other incidents which might be construed as evidencing discriminatory attitudes were referred to in the evidence of some witnesses. In particular, two incidents were the subject of discussion. First, attention was drawn to the fact that another black employee, Marlena Reid, was not hired back after an absence from work related to Ms. Reid's pregnancy. On this point, it was the evidence of Richard and Stanley Kowalewski that Ms. Reid called them to seek a return to her employment after the seventeen-week period of pregnancy leave to which she would be entitled by law. Stanley consulted with Richard on the matter. Once it was determined that they had no legal obligation to rehire Mrs. Reid, they declined to do so for the reason that they had no particular need of her services at that time. Although Mr. Millward and Mr. D'Oliveira questioned the veracity of this testimony, no direct evidence to the contrary was presented to the Board of Inquiry. A second incident, however, relating to the laying off of Ms. Dorcas Daley is more troubling. Mr. Richard Kowalewski testified that Ms. Daley was laid off by him because of a lack of work. On cross examination, Mr. D'Oliveira pointed out to Mr. Kowalewski that Ms. Daley had been engaged in her work in the

cutting room a few months longer than a person who was not laid off at that time, a Mr. Degar. Ms. Daley is a black woman. Mr. Degar is not black. Mr. Richard Kowalewski offered one or two lame excuses for what appears to be preferential treatment of Mr. Degar in his testimony but ultimately conceded that he did not think of any reason why Mr. Degar should have been preferred.

The Daley-Degar episode is the one incident in all of the incidents that were canvassed in the evidence before this Board of Inquiry which lends support to the view that Mr. Richard Kowalewski, at least, may have made an unfair employment decision with respect to a black employee for which a non-discriminatory explanation is lacking. Moreover, the evasiveness of Mr. Richard Kowalewski's responses to Mr. D'Oliveira's questions give rise to legitimate concerns about the straight-forwardness of Mr. Kowalewski's testimony. For this reason, I have been reluctant to reach any conclusion with respect to the non-discriminatory nature of the other employment decisions reviewed in these proceedings exclusively on the basis of Mr. Richard Kowalewski's evidence. Nontheless, it is my view that unresolved doubts about the Daley-Degar incident and the reliability of Mr. Richard Kowalewski's testimony do not provide a sufficient basis for concluding that these other incidents are to be explained on the basis of discriminatory attitudes on the part of Henry and Stanley Kowalewski. Nor am I persuaded by the evidence before this Board that Richard Kowalewski was motivated by discriminatory attitudes in his decision to dismiss Sid George.

Finally, more precise reference should be made to the statistical evidence which Mr. Millward and Mr. D'Oliveira advanced as what might be termed "circumstantial" evidence of discriminatory employment practices.

Essentially, two different statistics were thought to be significant by Mr. D'Oliveira. First, Mr. D'Oliveira pointed out that the number of black employees in the work force appeared to decline rather sharply in 1978 and that, as of December, 1978, only four black employees remained in the work force. The previous December, nine blacks were employed. One year previously, eleven blacks were employed at Natural Footwear. Secondly, Mr. D'Oliveira maintains that an examination of overall dismissal statistics indicates that an unusually high percentage of the dismissals of long-term employees involved black employees.

Mr. Cohen's responses to these arguments are, I think, persuasive. First, with respect to the drop in the number of blacks in the work force during 1978, Mr. Cohen points out that in that year only two blacks were fired, Phyllis Ingram and Sid George, and that in that same period, two new black employees were hired. The decline in the number of blacks in the work force is not to be explained, in Mr. Cohen's view, by discriminatory dismissal practices. Moreover, Mr. Cohen maintains that the hiring of black employees continued after this period of time and that when viewed in the longer term, the statistics relating to the number of black employees on the work force at Natural Footwear does not support the thesis advanced by Mr. Millward and Mr. D'Oliveira that Natural Footwear Limited engaged in discriminatory hiring or dismissal practices.

With respect to dismissal statistics, Mr. Cohen has pointed out that in view of the very substantial number of employees that have been dismissed over the years, blacks do not appear to have been singled out for unusually harsh treatment. Richard Kowalewski testified that the company records

indicate that 93 people have been dismissed during the period of Natural Footwear Limited's operation. Most of the discussion of dismissals statistics focussed on an exhibit (number 21) which was a list of all employees who had left the employment of Natural Footwear Limited for one reason or another during the period from 1976 to 1979. Of the 66 people on that list who were dismissed, it would appear that six of them were black employees. It should be noted that there is some disagreement as to the precise numbers involved as a result of certain disagreements as to whether, in one or two instances, the termination of the employment relation was, in fact, a dismissal. It was not suggested by Mr. D'Oliveira that these figures indicate that a disproportionate number of black employees were dismissed. Mr. D'Oliveira did point out, however, that the vast majority of the 66 dismissals occurred within the first nine months of the individual employee's period of employment. On the other hand, five of the six black employees on this list who were dismissed, were dismissed after working for the company for a period of two years or more.

As Mr. Cohen pointed out, however, the significance of this is somewhat ambiguous. Mr. Cohen argued that it might indicate that the company was more generous in its treatment of black employees whose work was not satisfactory. They were not fired as quickly, on average, as non-black employees. Mr. D'Oliveira, on the other hand, felt that the statistic constituted evidence that decisions were being taken to dismiss employees who had established a substantial record of satisfactory work at Natural Footwear Limited, and that this tended to show a discriminatory dismissal practice.

In assessing this evidence, it is important to note that the specific circumstances relating to dismissals of a number of these employees were

considered at length in the evidence before this Board of Inquiry, and that it has been found, in a careful review of the evidence, that the allegation that discriminatory attitudes played a role in these dismissals has not been supported in the evidence. This, together with the fact that the numbers involved are rather small, persuades me that it is not possible to draw any inference from these statistics in support of the thesis that the supervisory personnel at Natural Footwear Limited were engaged in a coordinated and concerted effort to reduce the number of black employees in their work force.

It follows from this finding, of course, that this evidence is not of assistance in attempting to draw inferences with respect to the state of mind of Mr. Stanley Kowalewski at the time of his dealings with the complainant, Phyllis Ingram.

VII. Conclusion

For the foregoing reasons, then, it is my finding that the complainant, Phyllis Ingram, and the Ontario Human Rights Commission have not established, on the balance of probabilities, either that Ms. Ingram was subjected to unfair conditions of employment or was dismissed from her employment by reason of her race or colour.

Again, however, I would emphasize that it is not the task of a Board of Inquiry in a case of this kind, to determine whether the dismissal of Ms. Ingram, or of the other employees whose dismissals were reviewed in the evidence submitted to this board, were justified or warranted in the sense that such sanctions were appropriate management

responses to the conduct or work performance of the individual involved. It may or may not be the case that one or another of these dismissal decisions was unduly harsh in this respect. An evidentiary basis for reaching conclusions on such questions has not been established before this Board.

I do not wish to leave this matter, however, without commenting on the evidence led on behalf of the complainant which suggests that the respondent has been slow to develop clear and orderly administrative policies and procedures with respect to the hiring, promotion and firing of employees and the terms and conditions of their employment. It may well be that in a appropriate case, the absence of orderly administrative practices -- such as the use of a clearly objective standard for measuring work performance -- may constitute evidence of discriminatory conduct. In the words of an American court, the lack of objective guidelines for such matters as hiring and promotion may constitute "badges of discrimination" which may serve to corroborate other evidence of discriminatory practices. See Brown v. Gaston County Dyeing Machine Co. (1972) 457 F. 2d 1377 at p. 1383. In the present case, however, I am persuaded that any administrative deficiencies of this kind present in the employment practices of the respondent result, as Mr. Cohen suggested in his argument, from the youth and inexperience of the respondent's supervisory personnel and the rapid rate of growth and expansion which the company has enjoyed over the past six or even years of its existence. At some point in time, of course, such explanations would lose their persuasiveness.

Quite apart from the potential evidentiary significance of such practices, however, it is appropriate to observe that the absence of proper administrative procedures of this kind may give rise to the reality or,

at the very least, the appearance of random and disparate decision-making in the work place. In such an atmosphere, perceptions of favouritism and racial or ethnic discrimination are likely to develop, especially of course, amongst employees who have been subjected to disciplinary measures of one kind or another. Whether or not such perceptions lead to the making of complaints under the Ontario Human Rights Code, the existence of suspicions of discriminatory treatment obviously undermines the development of the kind of workplace environment which it is the Code's objective to foster.

Having found that the allegations of discriminatory conduct advanced against the respondent have not been established, this complaint is dismissed.

Dated at Toronto this 6th day of March, 1980

John D. McCamus